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THESIS

**A CRIMINAL LAW APPROACH TO TERRORISM
IN BRAZIL**

by

Carlos Henrique Oliveira de Sousa

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Thesis Advisor:
Second Reader:

Michael Freeman
Douglas Borer

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A CRIMINAL LAW APPROACH TO TERRORISM IN BRAZIL

Carlos Henrique Oliveira de Sousa
Federal Police Commissioner, Brazilian Federal Police
B.S., Federal University of Rio de Janeiro Law School, Brazil, 1993

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**NAVAL POSTGRADUATE SCHOOL
December 2014**

Author: Carlos Henrique Oliveira de Sousa

Approved by: Michael Freeman
Thesis Advisor

Douglas Borer
Second Reader

John Arquilla, Ph.D.
Chair, Department of Defense Analysis

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ABSTRACT

The goal of this thesis is to present how Brazilian law treats terrorism. In particular, it seeks to develop a model bearing the core characteristics that an effective criminal law must have to fit the country's reality. We intend to conduct a thorough critical analysis of the current law, and present the requirements to design an adequate one. Therefore, the study path starts with an overview of Law 7170/83, which allegedly criminalizes terrorism in Brazil.

Next, we will show how international laws and agreements signed by Brazil obligate the country to have a law against terrorism. Finally, the text will show that adoption of a criminal law is one of the several approaches to dealing with terrorism and how civil liberties can be affected by the decision to criminalize such acts. In this context, and to show foreign experiences, we will use the comparative method to study the experience of six countries regarding criminal law dealing with terrorism: Argentina, Chile, Colombia, Peru, the United States of America, the United Kingdom of Great Britain, and Northern Ireland.

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LIST OF ACRONYMS AND ABBREVIATIONS

AMIA	<i>Asociacon Mutual Israelita Argentina</i> (Argentina-Israel Mutual Association)
ELN	<i>Ejercito de Liberacion Nacional</i> (National Liberation Army)
FARC	<i>Fuerzas Armadas Revolucionarias de Colombia</i> (Revolutionary Armed Forces of Colombia)
FIFA	<i>Federation Internationale de Football Association</i> (International Federation of Association Football)
IRA	Irish Republican Army
OAS	Organization of American States
UN	United Nations
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crimes
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act

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I. INTRODUCTION

The theme of this thesis was chosen because of the issues that have arisen during my own experience as a federal police commissioner. Several times in my career, I have seen and have been briefed by colleagues about the consequences of the weakness in the criminal law field. In some cases, we did not have the support of the law to interrupt acts that we knew were happening in our country. In other situations, I have witnessed cases where people were arrested on strong evidence, but the court released them because the interpretation was that an anti-terrorism law¹ did not exist in Brazil.² I am talking about serious crimes with consequences beyond the borders of Brazil.³

The goal of this thesis is to present how Brazilian law treats terrorism. In particular, it seeks to develop a model bearing the core characteristics that an effective criminal law must have to fit the country's reality. For this purpose, it is important to understand the debate as to whether such a criminal law already exists. Furthermore, if one does, but it is ineffective, we will discuss what the consequences could be for the counter-terrorism system. In fact, we intend to conduct a thorough critical analysis of the current law, and present the requirements to design an adequate one. Therefore, the study path starts with an overview of Law 7170/83,⁴ which allegedly criminalizes terrorism in Brazil. For this purpose, we present the historical context, and changes brought about by the new Federal Constitution in 1988,⁵ and analyze the decisions of the Brazilian Supreme Court⁶ about the respective law.

¹ Brazilian Federal Government, "Legislacao/Leis Ordinarias" [Legislation/Law] <http://www.planalto.gov.br>.

² Veja Magazine, "Exclusivo: Documentos da CIA, FBI e PF Mostram Como Age a Rede do Terror Islamico no Brasil" [Exclusive: Documents from CIA, FBI and FP Show How the Islamic Network Work in Brazil] April 2, 2011, trans. Carlos H. Oliveira de Sousa, <http://veja.abril.com.br/noticia/mundo/exclusivo-documentos-da-cia-fbi-e-pf-mostram-como-age-a-rede-do-terror-islamico-no-brasil>.

³ Ibid.

⁴ Brazilian Federal Government, "Legislacao/Lei 7170/83" [Legislation/Law 7170/83], trans. Carlos H. Oliveira de Sousa <http://www.planalto.gov.br>.

⁵ Ibid.

⁶ Brazilian Supreme Court, "Informativo/Pesquisa" [Informative/Research], trans. Carlos H. Oliveira de Sousa <http://www.stf.jus.br/portal/principal/principal.asp>.

Next, we will show how international laws and agreements signed by Brazil⁷ obligate the country to have a law against terrorism. Finally, the text will show that adoption of a criminal law, with some characteristics, is one of several approaches to dealing with terrorism and how civil liberties can be affected by the decision to criminalize such acts. In this context, and to show foreign experiences, we will use the comparative method to study the experience of six countries regarding criminal law dealing with terrorism: Argentina, Colombia, Peru, the United States of America, and the United Kingdom of Great Britain and Northern Ireland. In this step, the objective is to understand the costs and benefits of the adoption of such a criminal law in the selected countries.

The focus of the thesis is on what Brazil needs to do in order to improve its counter-terrorism law in the light of the following reasons: 1) the current law is not well defined; 2) it does not fulfill the requirements of the international treaties; and 3) the courts do not recognize it as a current law. The challenge in this work is to develop the core characteristics that a criminal law must have to fulfill the Brazilian reality. At the same time, this model must not affect civil liberties.

The main question is which criminal legal model best fits the Brazilian reality? To answer this question, first we need to address other questions: Does Brazil already have a criminal law regarding terrorism? In case of an attack, what, according to the Brazilian legal system, would the penalties be for the terrorist? How is Brazil engaged in the global system against terrorism, and what are its responsibilities and duties? Could criminal law provide an effective solution to prevent and combat terrorism?

⁷ Brazilian Federal Government, “Legislacao/Leis” [Legislation/Laws], trans. Carlos H. Oliveira de Sousa, <http://www.planalto.gov.br>.

II. BACKGROUND AND ENVIRONMENT

The United Nations Security Council has played an important role, publishing Resolution 1373 on September 28, 2001, urging all member states to criminalize terrorist acts.⁸ Despite the lead from the U.N. during the aftermath of 9/11, the aforementioned Resolution did not actually define terrorism. Therefore, it was left to each country to decide how the law would treat the theme. In this scenario, a scholar stated, “each nation was then to define terrorism according to its own history, objectives, and concerns.”⁹ Thus, it is crucial to understand Brazil’s particular structure for dealing with terrorism.

Despite the fact that Brazil has no history of terrorist attacks and enjoys a reputation for good relations on the international political scene, we cannot underestimate the possibility of an attack, mainly in view of the significant changes that have been taking place in the global scenario. Although the possibility of a terrorist attack is low, there is always a possibility of preparing, financing, or supporting terrorist activities from Brazil. At this point, it seems that Brazil fits the author’s words, “the trend in many countries is for terrorism-specific laws that target remote acts of preparation and planning that would not be caught by general offences of attempts, conspiracy, or incitement.”¹⁰ It must also be mentioned that in the 1960s and 1970s, during the military dictatorship, Brazil experienced the emergence of a counter-revolutionary movement¹¹ involving paramilitary groups with characteristics similar to those of terrorists.

The terrorist acts committed by the above-referenced insurgent groups in Brazil in the recent past were cited in doctrinaire studies as examples of innovation. According to

⁸ United Nations Organization, “Resolution 1373 (2001).”
[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1373\(2001\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1373(2001)).

⁹ Victor V. Ramraj et al., eds., *Global Anti-Terrorism Law and Policy* (New York: Cambridge University Press, 2012), 4.

¹⁰ *Ibid.*, 114.

¹¹ Elio Gaspari, *As Ilusões Armadas Vol. 1* [The Armed illusions] *A Ditadura Envergonhada* [The Ashamed Dictatorship], trans. Carlos H. Oliveira de Sousa (Sao Paulo: Companhia das Letras, 2002), 252.

Martha Crenshaw,¹² “the development of diplomatic kidnappings began with the Brazilian revolutionary movement in 1968, and was adopted by the Uruguayan Tupamaros in their shift to the urban guerrilla.” Innovation is the keyword in this text, not in the sense used by Professor Martha Crenshaw in the aforementioned text, but in the current use of the term. A terrorist attack in Brazil during the mega sporting events would be classified as a form of innovation in terms of the local reality.

It is important to highlight a statement from an authority that deals with terrorism investigation in Brazil. According to Brazilian Federal Police Director of Intelligence Daniel Lorenz, during a Public Security Commission hearing in the Deputy Chamber, where the theme of terrorism was presented:¹³

Previously, extremists passing through the country used it as a staging post. Then, they began to adopt prostitutes’ children in order to be able to remain in the country. After, they proceeded to indoctrinate Brazilians with their radical rhetoric. Now, using the country as a base, they are preparing to launch attacks against targets abroad.

Currently, terrorism is a theme under debate in Brazil because of the major events that the country held in 2014—the FIFA World Cup,) and, will hold in 2016—the Summer Olympic Games). The country hosted the World Cup between June 12 and July 13, 2014. It was one of the biggest events on the planet, and the number of tourists, both Brazilian and foreign, was almost 3.7 million.¹⁴ It was forecasted that, worldwide, more than 1 billion people watched the matches via the broadcast media.¹⁵ In addition, it is estimated that the Olympics, to be held in June 2016, will attract 4.5 billion spectators around the world.¹⁶

¹² Martha Crenshaw, “Innovation: Decision Points in the Trajectory of Terrorism.” prepared for the Conference on “Trajectories of Terrorist Violence in Europe,” Minda de Gunzburg Center for European Studies, Harvard University, Cambridge, Massachusetts, March 9–11, 2001.

¹³ Paulo Roberto de Almeida, “1350 Brasil com Base de Apoio ao Terrorismo Islamico” [Brazil as a Base to the Islamic Terror], trans. Carlos H. Oliveira de Sousa, *Blog Diplomatzando*, <http://diplomatzando.blogspot.com/2009/09/1350-brasil-como-base-de-apoio-ao.html>.

¹⁴ Brazilian Federal Government, “2014 FIFA World Cup.” <http://www.copa2014.gov.br>.

¹⁵ Ibid.

¹⁶ Organizing Committee for the Olympic and Paralympic Games Rio 2016 “2016 Olympic Games.” <http://www.rio2016.org.br>.

Brazil still has not clarified the doubt regarding the existence of a criminal law addressing terrorism.¹⁷ This constitutes an extremely sensitive point for a nation that intends to perform an important role as a regional leader. Besides the major events it will host, Brazil is facing the consequences of globalization and preparing for the new challenges on the horizon. In this regard, terrorism is one of the principal themes, and its consequences reach beyond country borders. Only through concerted effort among nations is it possible to construct barriers to contain this growing phenomenon. For this reason, it is necessary for the country to prepare clear responses in advance. A lack of definition on the legal aspect of the theme only increases the legal insecurity. It is important to discuss the scenario expected in the country over the coming years, especially with regard to the aforementioned mega-events.

Brazil is not well prepared to deal with terrorism, especially because of the controversy concerning whether there exists a criminal law against terrorism. The focus of this thesis is to develop a criminal law model that best matches the Brazilian reality. Thus, we began by researching the existence of criminal law addressing terrorism, how such law may affect civil liberties, and the legal and security system of the country.

A. MAIN THEORIES

There are several kinds of counter-terrorism approaches. One of them is passing legislation with the aim of fighting terrorism.¹⁸ According to Kent Roach,¹⁹ “the criminal law can play a unique role in exposing, denouncing, and punishing terrorism, but it should only be one element in a comprehensive anti-terrorism strategy.” At this point, a controversial debate arises: first, if such a law actually exists in Brazil, and secondly, regarding the focus on the consequences for the constitutional rights or civil liberties. The

¹⁷ Paulo de Tarso Resende Paniago, “Legislacao Brasileira Especifica Sobre Terrorismo e os Grandes Eventos Internacionais” [Brazilian Specific Legislation About Terrorism and the Major Events], trans. Carlos H. Oliveira de Sousa, SAGRES Politica e Gestao Estrategica Integradas Organization website, <http://sagres.org.br/legislacao-brasileira-especifica-sobre-terrorismo-e-os-grandes-eventos-internacionais/>.

¹⁸ Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response* (New York, NY: Routledge, 2011), 75.

¹⁹ Ramraj et al., eds., *Global Anti-Terrorism Law and Policy*, 93.

Brazilian Federal Constitution,²⁰ promulgated in 1988, addresses the theme of terrorism, putting it in the spotlight in a very important chapter that deals with individual and collective rights and duties. Articles 4²¹ and 5²² read (in part) as follows:

Article 4: The international relations of the Federative Republic of Brazil are governed by the following principles: VIII—repudiation of terrorism and racism.

Article 5: XLIII—the practice of torture, the illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as non-bailable, and not subject to grace or amnesty, and their principals, agents, and those who omit themselves while being able to avoid such crimes shall be held liable.

Although the Brazilian Federal Constitution placed the theme of terrorism on a par with other very important chapters, the legislators did not in fact attribute it the same weight.²³

Before beginning to present the discussion on the theme under Brazilian criminal law, it is important to stress that, in the Brazilian legal system, a law is required to be in accordance with the Constitution for it to have validity/efficacy.²⁴ In this case, Brazilian legal doctrine defines two situations for laws to be compatible with the 1988 Federal Constitution: those that were devised at a date prior to its promulgation, and those that were devised subsequent to its promulgation. The laws that were created in the pre-1988 period underwent a process of acceptance in relation to the new constitutional order. This meant that the content of the law had to be in full accordance with the principles and basic tenets set forth in the Constitution. If the law did not obey this requirement, the jurists stated that the law was not accepted by the new juridical order established after

²⁰ Brazilian Federal Government, “Constituicao Federal de 1988” [1988 Brazilian Constitution], trans. Carlos H. Oliveira de Sousa, <http://www.planalto.gov.br>.

²¹ Ibid.

²² Ibid.

²³ Marcello Ovidio Lopes Guimaraes, *Tratamento Penal do Terrorismo* [Criminal Treatment of Terrorism], trans. Carlos H. Oliveira de Sousa (Sao Paulo: Quartier Latin, 2007), 83.

²⁴ Luiz Roberto Barroso, *O Controle de Constitucionalidade no Direito Brasileiro* [The Constitutional Judicial Review in Brazilian Law], trans. Carlos H. Oliveira de Sousa (Sao Paulo: Saraiva, 2012), 7.

this Constitution.²⁵ In this case, the law was no longer valid or efficacious. Under the second hypothesis, when a law was promulgated at a date after 1988, it was examined and considered constitutionally valid if it obeyed the parameters established by the Constitution. Otherwise, it was declared unconstitutional and, therefore, without validity or efficacy.²⁶

Law 7.170,²⁷ promulgated in 1983, was denominated Lei de Seguranca Nacional [National Security Law], Article 20,²⁸ which stated the following:

Article 20: Devastate, loot, extort, rob, kidnap, illegally imprison, commit arson, vandalize, cause explosion, commit an assault or act of terrorism due to political inconformity or for the acquisition of funds aimed at the maintenance of clandestine or subversive political organizations. Penalty: imprisonment for 3–10 years.

In principle, it would seem crystal clear that there exists a criminal law dealing with the theme of terrorism. Nevertheless, the aforementioned law was promulgated in 1983, during a military government, and the objective was to prevent the action of insurgent groups in the country.²⁹ It is important to underline the fact that the 1988 Federal Constitution was precisely the culmination of a political act that marked the end of the military government.³⁰ Although the military had left power in 1985, the new internal order was reconfigured by the 1988 Constitution, after the election of parliamentary representatives for this purpose.

Indeed, there are two major groups in the debate regarding the validity or efficacy of Law 7170/83. The first, maintains that the crime of terrorism is already covered by Law 7170/83.³¹ For this group, Law 7170/83 is still valid or efficacious due to its having been ratified by the new constitutional order designed by the 1988 Federal Constitution.

²⁵ Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, 7.

²⁶ Ibid.

²⁷ Brazilian Federal Government, “Legislacao/Lei 7170/83.” <http://www.planalto.gov.br>.

²⁸ Ibid.

²⁹ Gaspari, *As Ilusoes Armadas Vol. 1 A Ditadura Envergonhada*, 252.

³⁰ Barroso, *O Controle de Constitucionalidade no Direito Brasileiro*, 7.

³¹ Guilherme de Souza Nucci, *Leis Penais e Processuais Comentadas* [Criminal and Procedure Law Commented], trans. Carlos H. Oliveira de Sousa (Sao Paulo: Revista dos Tribunais, 2008), 88.

According to this group's thesis, nowadays, Brazil does have a criminal law that covers counter-terrorism. The second group holds that the law no longer has validity or efficacy due to being discordant with the principles introduced into the Brazilian legal system by that Constitution.³² In short, the discussion about the existence of a criminal law in Brazil about terrorism can be divided into two distinct doctrinal groups: the first argues that Brazil does have a law criminalizing terrorism, and the second states that it does not.

The first group, led by Professor Guilherme de Souza Nucci,³³ affirms that Brazil has a law defining the crime of terrorism, and bases its arguments as follows: this crime is already covered by article 15/20 of Law 7170/83. According to this position, Law 7170/83 is totally constitutional, thus bearing full efficacy or validity.

Regarding the second group, represented by Professor Alberto Silva Franco,³⁴ the main point that supports the formulation of the theory of non-existence of such a law is as follows: the referred law was promulgated at the end of the time of the military dictatorship and its focus was on counter-revolutionary movements acting in opposition to the regime. Upon democratization and the establishment of a new constitutional order, the aforementioned law was not incorporated into the new statute after the 1988 Brazilian Constitution. In other words, the law no longer had efficacy or validity, given that it had not been accepted by the Constitution. Another major point is that the law does not define the crime of terrorism; it only states generic circumstances. Thus, it violates the principle of legality written in the 1988 Federal Brazilian Constitution.³⁵ According to the principle of legality, "one cannot be punished for doing something that is not prohibited by law."³⁶

Another key focus in the discussion of this issue is the Brazilian Supreme Court. It is currently judging a provisional arrest warrant for the purpose of extraditing a foreign

³² Alberto da Silva Franco, *Crimes Hediondos* [Heinous Crimes], trans. Carlos H. Oliveira de Sousa (Sao Paulo: Revista dos Tribunais, 1994), 132.

³³ de Souza Nucci, *Leis Penais e Processuais Comentadas*, 88.

³⁴ da Silva Franco, *Crimes Hediondos*, 136.

³⁵ Brazilian Federal Government, "Constituicao Federal de 1988." <http://www.planalto.gov.br>.

³⁶ A. Mokhtar, "Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects." *Statute Law Review* 26 (2005): 41, doi:10.1093/slr/hmi005.

citizen.³⁷ In this trial, one of the main points is the analysis and precise definition of the existence of a law regarding the crime of terrorism in Brazil. In fact, the reason for the extradition request was the act of committing a terrorism offense in the requesting country. At this point, it is important to clarify that, according to the Brazilian constitutional system, a request for extradition is possible only if there is a corresponding crime in Brazilian criminal law.³⁸ Thus, to complete the trial, the Brazilian Supreme Court will have to rule on which of the understandings is to be adopted with regard to the existence of criminal law defining terrorism.

Both groups have a deficiency: neither examines the law with regard to the principles of the international treaties signed by Brazil in recent years. Indeed, we are in alignment with the group that understands that Brazil does not have such a criminal law. Because Law 7170/83 was not incorporated into the new order created by the 1988 Federal Constitution, it had no efficacy or validity. Moreover, assuming no criminal law against terrorism exists, another important discussion is required to establish the need for the creation of one. In a consolidated Brazilian democratic regime, balance must be achieved between establishing an anti-terrorism law and possible restriction of civil liberties.

Indeed, the idea is to think of how to safeguard civil liberties in a scenario of change in the law with the aim of attempting to combat the new threats. In general, new laws against terrorism are perceived by some authors as undermining civil liberties and human rights. In this thesis, I will analyze how criminal law affects civil liberties in Brazil based upon comparison with the 6 selected countries.

The six countries—Argentina, Chile, Colombia, Peru, the USA, and the UK—were selected because of several reasons. First, all six are democratic countries; second, they are closest to the Brazilian reality; third, Argentina, Chile, Colombia, and Peru are developing countries, have the same civil legal system, and are in South America, close to Brazil; and finally, the United States and the UK are the leaders in the global fight

³⁷ Brazilian Supreme Court, “Informativo/Pesquisa.”
<http://www.stf.jus.br/portal/principal/principal.asp>.

³⁸ Ibid.

against terrorism. At the end of the analysis of these countries, the focus is to describe the costs and benefits of the way they deal with criminal law against terrorism and how this affects civil liberties. Furthermore, the experiences of the six will indicate legal models that could lead to improvement in the Brazilian law. For this, the aim is to use the six countries as case studies to develop a new model for the Brazilian reality.

It is important to emphasize that Brazil currently has a bill under debate in Congress.³⁹ In fact, the bill is not already a law today because of pressure against it from people who represent organized civil society, and who claim that it would reduce civil liberties, especially the right to protest against the government.⁴⁰ In summary, the discussion about the existence of a Brazilian terrorism law, the consequences for civil liberties and a model of criminal law that best fit the reality are the main points of the thesis.

³⁹ Brazilian Senate, “PLS – Projeto de Lei do Senado, No 499 de 2013” [Senate, Bill of Law 499 2013], trans. Carlos H. Oliveira de Sousa, http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=115549.

⁴⁰ Nivaldo Garcia, “Relator Promete Rigor em Nova Lei de Terrorismo e Nega Risco Para Movimentos Sociais” [Rapporteur Promises Rigor New Law of Terrorism and Denies Risk Social Movements], trans. Carlos H. Oliveira de Sousa, *IG Magazine* (July 14, 2013), <http://ultimosegundo.ig.com.br/politica/2013-07-14/relator-promete-rigor-em-lei-de-terrorismo-e-nega-risco-para-movimentos-sociais.html>.

III. LAW 7170/83 – BACKGROUND

Law 7170/83 was created in 1983,⁴¹ at which time Brazil had been governed by the military since a 1964 coup.⁴² The takeover had deposed the President, elected according to the constitutionally enshrined democratic laws and rules in force. Congress suffered the consequences, with several representatives being forced out of office. In the Judiciary branch of government, the same occurred in the case of two Supreme Court judges.⁴³ Thomas C. Wright wrote the following about the period.⁴⁴

By 1969, by the accession of the third of Brazil's five military presidents, the government had become an undisguised dictatorship using terror against its citizens as a means of retaining power –the model for the new anti-revolutionary State.

During the dictatorship period, the military committed diverse atrocities, including several arrests, torture, killings, kidnappings, and disappearances of people (missing until today).⁴⁵ Most of the opposition was shut down. Furthermore, in order to persecute the opponents of the regime, one of the principal instruments used was the Lei de Segurança Nacional [National Security Law] or Law 7170/83. This law was the legal face of the dictatorial system. Before Law 7170/83, the country had had several other legal instruments for the same purpose, such as the Decree-Laws 314/67, 510/69, and 889/69, as well as Law 6620/78.⁴⁶

⁴¹ Brazilian Federal Government, “Legislacao/Lei 7170/83” [Legislation/Law/7170/83], trans. Carlos H. Oliveira de Sousa, <http://www.planalto.gov.br>.

⁴² Thomas E. Skidmore, *The Politics of Military Rule in Brazil 1964 – 85* (Oxford: Oxford University Press, 1988), 18.

⁴³ Ibid.

⁴⁴ Thomas C. Wright, *Latin America in the Era of the Cuban Revolution* (London: Praeger, 2001), 151.

⁴⁵ D. Paulo Evaristo Arns, *Brasil: Nunca Mais* [Brazil: Never More], trans. Carlos H. Oliveira de Sousa (Petropolis: Vozes, 2000), 129.

⁴⁶ Guimaraes, *Tratamento Penal do Terrorismo*, 78.

According to Marcello Ovidio Lopes Guimaraes:

In 1967, already under the military regime that had begun three years before, Decree-Law no. 314 once again defined the “Crimes contra a Segurança Nacional e a Ordem Política e Social” [Crimes Against National Security and Political and Social Order], conceiving national security as an array of measures aimed at preserving external and internal security, including the prevention and repression of adverse psychological war and revolutionary or subversive war.⁴⁷

Despite the general nature of the definition, the main aim of the creation of this legal instrument in 1967 was to block opposition to the regime and repress the counter-revolutionary movement that was emerging. Moreover, in this combat, torture was institutionalized and used methodically during interrogations.⁴⁸

In summary, during the military dictatorship, Law 7170/83 was used initially to block the opposition, and later to outlaw the counter-revolutionary movement. It is important to highlight that some acts committed by the counter-revolutionary movement had terrorist characteristics, including kidnapping and execution of persons contrary to their interests, as explained in the first chapter. These acts, however, were not on the scale of those practiced by representatives of the regime in power at that time.⁴⁹

After the end of the military government and the restoration of democracy in the country, a new political scenario was configured, featuring all the specificities of a post-dictatorship period. The peak of this period is represented by the 1988 Constitution.⁵⁰ At that time there was concern to establish, guarantee, and consolidate all the advances typical of democracy. As a means of solidifying the new democratic regime, the method employed was to include all the juridical assets and values to be protected in the Constitution. It was also a means of averting any possibility of having a government with

⁴⁷ Ibid.

⁴⁸ Gaspari, *As Ilusões Armadas Vol. 1 A Ditadura Envergonhada*, 252.

⁴⁹ Ricardo Bonalume Neto, “Mortos na Ditadura Militar Pela Esquerda São Estimados em 120” [Deaths in the Dictatorship by the Left Wing are Estimated at 120], trans. Carlos H. Oliveira de Sousa, *Folha de São Paulo* (May 27, 2012), <http://www1.folha.uol.com.br/poder/1096272-mortos-na-ditadura-militar-pela-esquerda-sao-estimados-em-120.shtml>.

⁵⁰ Celso Ribeiro Bastos and Ives Gandra Martins, *Comentários à Constituição do Brasil* [Brazilian Constitution Commented], trans. Carlos H. Oliveira de Sousa (São Paulo: Saraiva, 1989), 184.

too many powers and guaranteeing that the conquests would be crystallized by being enshrined in the Constitution.

Consequently, the theme of terrorism was elevated to the level of the 1988 Federal Constitution in a very important chapter that deals with individual and collective rights and duties.⁵¹

Despite the new Constitution and the democratic regime, one of the points that most symbolizes and represents the military government period was the aforementioned *Lei de Segurança Nacional* or Law 7170/83. Mere mention of this law arouses nationwide sentiment against it, given that it had served to contain, arrest, and take legal action against legitimate opponents of the regime and, later, members of the counter-revolutionary movement.⁵²

Against this background, the law was judged to run counter to the Constitution, according to various scholars, a belief that was later reflected in court decisions.⁵³

Technically, Law 7170/83 was not well constructed because it was very open regarding the description of the crimes. The definition of a criminal act against national security was extremely broad. Almost everything could fit the condition. In this sense, any kind of opposition to the regime could have been configured leading to an accusation based on the law.

According to Marcello Ovidio Lopes Guimarães, the problem of the *Lei de Segurança Nacional* was precisely the lack of definition of the term, terrorism:⁵⁴

The fact is, as has been repeated over the years, that the law maintained the expression, “practice terrorism.” when, in fact, it should have provided an effective definition of the crime, given that a specific wrongful action termed terrorism did not exist. This expression may be applied to various crimes, characterized by considerable damage caused to persons and property, from the perspective of common danger, through the real or

⁵¹Bastos and Martins, *Comentarios a Constituicao do Brasil*, 184.

⁵²da Silva Franco, *Crimes Hediondos*, 112.

⁵³Ibid.

⁵⁴Guimaraes, *Tratamento Penal do Terrorismo*, 86.

potential creation of intimidation or terror, and, furthermore, for a socio-political purpose.

The problem of the law, besides the lack of technical skill in its drafting, was the defect in terms of legitimacy found in its historical link with a political regime under which constitutional guarantees and civil rights were suppressed.

But why does Brazil need an anti-terrorism law? This question gives rise to a variety of answers. The starting point is to analyze the international scenario and, afterwards, explain the commitments assumed by the country in the ambit of the international organs that obligate it to establish a law on this theme.

A. INTERNATIONAL SCENARIO

After the Cold War period, discussion regarding international security underwent significant change, going beyond the traditional approach based on the idea of war and peace among states.⁵⁵ Nowadays, scholars include the theme of terrorism on the list of strategic threats.

According to Professor Martin van Creveld:⁵⁶

Extensive conflict of this nature will cause existing distinctions between government, armed forces, and people to break down. National sovereignties are already being undermined by organizations that refuse to recognize the state's monopoly over armed violence. Armies will be replaced by police-like security forces on the one hand and bands of ruffians on the other, not that the difference is always clear even today. National frontiers, that at present constitute perhaps the greatest single obstacle to combating low-intensity conflict, may be obliterated or else become meaningless as rival organizations chase each other across them. As frontiers go, so will territorial states.

⁵⁵ Clovis Brigagão and Domicio Proença Jr., “Desafios para a Política de Segurança Internacional: Missões de Paz da ONU, Europa e Américas” [Challenges for International Security Policy: Missions of UN Peacekeeping, Europe and the Americas], trans. Carlos H. Oliveira de Sousa, in *Antiterrorismo na América Latina* [Anti-Terrorism in Latin America] (São Paulo: Hucitec, 2004), 293.

⁵⁶ Martin van Creveld, *The Transformation of War* (New York: The Free Press, 1991), 225.

B. BILL OF LAW

Although over 26 years have elapsed since the promulgation of the 1988 Constitution and the consequent unconstitutionality of Law 8170/83, to this day the bill of law regarding terrorism being debated in Congress has still not been voted. There are several reasons for this. One of the main ones is that described by the jurist and professor Marcello Ovidio Lopes Guimaraes:⁵⁷

Countries that have terrorism as a real and present problem, incessantly suffering the consequences of terrorist acts, and having their public security structures severely shaken due to this (fortunately, this does not occur in the case of Brazil), are more agile in their attempts to define terrorism and seek the type or types of crime and penalty that apply.

The first attempt at the establishment of a criminal law occurred two days after 9/11. The president of the republic at that time, Fernando Henrique Cardoso, determined that the Minister of Justice must issue firm measures to combat terrorism. Consequently, a preliminary bill of law was submitted to Congress to establish a new title in the Penal Code, the aim being to replace the *Lei de Segurança Nacional*. This preliminary gave rise to the Bill of Law no. 6.764/02, which, among other provisions, typified terrorism and determined penalties for its perpetrators.⁵⁸

The referred Bill of Law was subsequently appended to the other legislative proposal about the same matter, and it has remained under analysis by the National Congress until today.⁵⁹ The reason discussion on this matter has not yet been concluded is the firm opposition from sectors linked to organized civil society. In the understanding of representatives of the social movements, a law that criminalizes terrorism could serve to prevent the population from exercising its right to protest/demonstrate.

⁵⁷ Guimaraes, *Tratamento Penal do Terrorismo*, 78.

⁵⁸ Brazilian Chamber of Deputies, “Projeto de Lei 6.764/02” [Bill of Law 6.764/02], trans. Carlos H. Oliveira de Sousa, <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=51185>.

⁵⁹ Ibid.

C. OPPOSITION FROM CIVIL SOCIETY

Another important factor that acts as an obstacle to approval of the Bill of Law 499/2013⁶⁰ is opposition to the proposal by groups linked to the defense of civil rights. According to these groups' position, a counter-terrorism law could curtail freedom of expression and protest against the government, thereby adversely affecting the civil rights reclaimed in recent years.⁶¹

On the other hand, it is important to emphasize that clear rules are a necessity in every organized society. If crimes are occurring, the respective agencies will handle them with or without a law. The role of the law is to create stability, transparency, and control. Without law, the agencies work in the darkness of the lack of law. In this circumstance, it is clear that the reality of the facts is much more dynamic than the creation of laws and policies. In the current scenario in Brazil, the agencies are dealing with terrorism, but the legal vacuum creates a lot of instability. In fact, it also creates a situation in which two, or more, agencies work on the same target. The role of the law in creating stability and security is important to organize a country based on a strong foundation. In summary, with a law against terrorism, organized civil society can exercise better control over governmental agencies.

D. UNITED NATIONS

Decisions arising from the United Nations General Assembly (UNGA) demonstrated the path followed by member countries until the adoption of the resolutions that currently orient the combat of terrorism in the international ambit.⁶² Thus, here it is apt to cite the teachings of Ciro Leal M. da Cunha.⁶³

⁶⁰ Ibid.

⁶¹ Veja Magazine, "Exclusivo: Documentos da CIA, FBI e PF Mostram como Age a Rede do Terror Islamico no Brasil." April 2, 2011, trans. Carlos H. Oliveira de Sousa, <http://veja.abril.com.br/noticia/mundo/exclusivo-documentos-da-cia-fbi-e-pf-mostram-como-age-a-rede-do-terror-islamico-no-brasil>.

⁶² United Nations, "International Legal Instruments." <http://www.un.org/en/terrorism/instruments.shtml>.

⁶³ Ciro Leal da Cunha, *Terrorismo Internacional e Política Externa Brasileira Após o 11 de Setembro* [International Terrorism and Brazilian Foreign Policy after 9/11], trans. Carlos H. Oliveira de Sousa (Brasília: Fundacao Alexandre de Gusmao, 2011), 32.

In 1972, the theme of international terrorism was included for the first time on the UNGA agenda. The debates in that year revolved around two basic options: (a) juridical-normative treatment to isolate terrorism from the socio-political context, formulating a general abstract concept, and thus legislate in terms of crime with impersonal abstract rules. Such was the position of the western bloc, desirous of an international treaty for repression; and (b) a juridical-political approach to prevent terrorism by means of identification and elimination of its underlying causes, particularly colonialism and racism. This would arise from analysis of the international order and ways of subverting it to deal with terrorism. The idea was defended by the Afro-Asian group and supported by the communist bloc. In principle, the perspectives did not seem exclusive; however, whereas the first emphasized repression of terrorism, the second favored elimination of the causes, in particular, colonialism, a context in which it would be legitimate to use violence.

From these discussions, Resolution 3034 (XXVII) was adopted, the result of relative convergence. The title of Resolution 33 showed the predominance of the juridical-political vision on that occasion. The document did not provide any concrete measure for repression of terrorism, nor did it at least condemn it. On the contrary, it focused on the underlying causes of terrorism and people's right of self-determination – condemned colonialism and legitimized national liberation movements. It also established a Special Committee on Terrorism (called “Comitê dos 35”), which, between 1973 and 1979, operated without managing to reach a consensus. In those years, dissension between the two approaches described above prevailed; the AGNU Resolutions about the theme were only adopted due to the Afro-Asian majority in favor of the juridical-political focus.

Later, according to the same author, Resolution 40/61, issued in 1985, expressed the following consensus within the United Nations.⁶⁴

All acts, methods and practices of terrorism, committed anywhere and by anyone, were unequivocally condemned and qualified as criminal. Since then, all the resolutions have included this unconditional repudiation, which demonstrates the current prevalence of the juridical-normative vision. This process, strengthened in the 1990s, was favored, among other factors, by the virtual end of decolonization, the end of the Cold War, and by the process of Arab-Israeli peace. AGNU Resolution 49/60 was paradigmatic of the change. Passed in 1994 and renewed annually, it included unequivocal condemnation and a call for international anti-terrorist co-operation, without mentioning the underlying causes, not even

⁶⁴ da Cunha, *Terrorismo Internacional e Política Externa Brasileira Após o 11 de Setembro*, 39.

in the preamble. In fact, an original important characteristic of the AGNU Resolutions in the 1990s and in the post-9/11 period has been the new emphasis on repressive measures. Synthetically, the international community has shifted from a juridical-political vision of terrorism—condescending with the scourge in particular situations, especially in national liberation movements—to a juridical-normative one of unequivocal condemnation of the phenomenon. It began to emphasize repressive measures and demand greater rigor in the co-operation of states in this respect.

The objective of highlighting these points is to demonstrate the evolution of international thinking prior to the adoption of a juridical-normative vision regarding combat. It is noteworthy that this vision was altered after the 9/11 attacks. This position, however, was established by member states of the United Nations.

Furthermore, the origin of this effort comes from the coordination of the United Nations in this regard. The United Nations Security Council Resolution 1373⁶⁵ (2001) guided its members to adopt laws against terrorism. Indeed, Resolution 1373 (2001) establishes:

1. ... all States shall: (b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.

According to Victor V. Ramraj:⁶⁶

First, through Security Council Resolution 1373, the Security Council has been said to have assumed the role of a global legislator, claiming authority under Chapter VII of the UN Charter to legislate counter-terrorism norms at the international level ('to restore international peace and security') and requiring states to implement those norms through domestic legislation.

At this point, we will focus on the treaties and conventions created by the United Nations—ones with which Brazil is obliged to comply—and on how the obligation to create a criminal law against terrorism has been established.

⁶⁵ United Nations, *Global Survey of the Implementation of Resolution 1373 (2001)*, <http://www.un.org/en/sc/ctc/docs/2011-globalsurvey1373.pdf>.

⁶⁶ Ramraj et al., eds., *Global Anti-Terrorism Law and Policy*, 48.

E. BRAZIL AND THE TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

The international anti-terrorist regime establishes norms that can be divided into those that are preventive and those that are repressive. The preventive norms arise from the sovereign equality of the states and those of repression are founded on the principle of avoidance of impunity for those guilty of terrorism.⁶⁷ According to Ciro Leal da Cunha:⁶⁸

With regard to prevention, States must endeavor to avert attacks being committed against other States or nationals of these in their own territories, as well as curb the organization of preparative activities for terrorism against other territories. A list of these duties is set forth in AGNU Resolutions 49/60 and 51/210.

The obligation of international co-operation lies in the duty of prevention, where, for example, one could mention the duty to exchange information. The duties of co-operation are found in the partial treaties about terrorism, and likewise in all the consensual AGNU resolutions.⁶⁹

Concerning the norms of repression, the following are duties of the state:⁷⁰

With regard to repression of terrorism, the basic general duty of the State is the extradition or criminal trial of alleged terrorists in its territory (the *aut dedere aut judicare* principle). This arises from anti-terrorist treaties and general international law. As accessory repressive duties, States must: (a) typify the offences covered by treaties established under national law, besides establishing jurisdiction over these crimes; (b) supply information relating to the circumstances of the acts and the alleged terrorists; (c) detain suspects, according to the situation, and conduct a preliminary investigation of the facts; (d) provide all possible assistance to the criminal court process or extradition (such as the transport of the accused and respective evidence); and (e) report on the results of the procedures for repression and punishment of terrorists.

⁶⁷ da Cunha, *Terrorismo Internacional e Política Externa Brasileira Após o 11 de Setembro*, 45.

⁶⁸ Ibid., 46.

⁶⁹ United Nations Organization, "Resolutions." <https://www.unodc.org/unodc/en/treaties/CAC>.

⁷⁰ da Cunha, *Terrorismo Internacional e Política Externa Brasileira Após o 11 de Setembro*, 47.

The need to establish a criminal law about terrorism lies among the state's accessory duties in the respective combat. It is from this obligation that there arises Brazil's duty to create such a criminal law.

IV. HOW DO SIX DEMOCRATIC COUNTRIES DEAL WITH COUNTER-TERRORISM CRIMINAL LAW?

A. OVERVIEW

This chapter will analyze the approach of six countries regarding the application of criminal law to terrorism. The selection of the six democratic countries represents an attempt to show specific situations in the Americas and Europe. The focus is to show the legal models, backgrounds, main characteristics, and consequences of the types of laws adopted in the selected countries. Furthermore, it will discuss the effects on civil liberties.

We must be conscious of just how broad in scope such a comparison is. In fact,

it is always risky and difficult for a scholar to describe a foreign legal system, especially considering the existing endogenous differences among the various systems and the natural obstacles to faithfully capturing the meaning and scope of the juridical norms that emanate from another culture featuring distinct social values, and economic and political peculiarities.⁷¹

It is important to emphasize that the counter-terrorism legislation includes some possibilities or amendments that allow the state to bypass its own legislation in special situations. After the first attack on the World Trade Center (1993) and the Oklahoma bombing (1995), the U.S. Congress passed the Antiterrorism and Effective Death Penalty Act of 1996.⁷² At that time, authors considered that this kind of legislation was responsible for “one of the worst assaults on the Constitution in decades.”⁷³ It is noteworthy that these opinions were expressed in 1996, before 2001. Consequently, the debate about the adoption of laws against terrorism is very controversial, especially

⁷¹ Ada Pellegrini Grinover, “O Crime Organizado no Sistema Italiano” [Organized Crime in the Italian System], trans. Carlos H. Oliveira de Sousa, *O Direito em Revista*, 2 (1996): 298.

⁷² U.S. Government Printing Office, “Antiterrorism and Effective Death Penalty Act of 1996.” <http://www.gpo.gov/fdsys/pkg/PLAW-104publ132/html/PLAW-104publ132.htm>.

⁷³ James X. Dempsey and Cole Dave, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (New York: The New Press, 2006), 2.

because they could be used to repress public protest and otherwise affect civil liberties.

Jonathan R. White states:⁷⁴

The controversy about antiterrorist legislation arises from concerns about civil liberties. The legal solution has become controversial, because some critics have maintained that governments have overreacted to the problem of terrorism. They have argued that antiterrorist legislation is based on a political agenda, rather than on an objective assessment of the terrorist threat.

Despite such concerns and, sometimes, reactions on the part of civil liberties groups, the majority of democratic countries have adopted criminal laws against terrorism.

At this point, it is interesting to show that, according to Lindsay Clutterbuck,⁷⁵ there are three levels of legislative focus:

The legislation broadly focused on three levels. First, specific crimes that are particularly associated with terrorism have been targeted by specific legislation, both to prevent them from occurring and to subject the perpetrators to increased penalties if they are committed (e.g., the hijacking of commercial aircraft). Second, an increasingly diverse number of activities that terrorists need to engage in if they are to function have been newly criminalized (e.g., engaging in money raising, eliciting support, or openly recruiting). Third, extraordinary investigative powers have been given to the numerous law enforcement and other investigative agencies whose responsibility it is to deal with crime committed by terrorists.

At this point, it is important to enter the specific terrain of the legislation in each of the countries, and it is worth noting the teaching of Professor Marcello Ovidio Lopes Guimaraes:⁷⁶

The initial idea for the combat of terrorism in the national legislation was, and often still is, the exclusive protection of internal order in the states. Thus, constantly, for such combat, the internal norm of common law penal figures were deemed sufficient, such as those applying to arson or

⁷⁴ Jonathan R. White, *Terrorism: An Introduction* (Belmont, CA: Wadsworth, 2002), 275.

⁷⁵ Audrey Kurth Cronin and James M. Ludes, eds., *Attacking Terrorism: Elements of a Grand Strategy* (Washington, DC: Georgetown University Press, 2004), 144.

⁷⁶ Guimaraes, *Tratamento Penal do Terrorismo*, 19.

explosion. And certainly, therefore, following this line of reasoning, most of the internal legislation regarding the theme considers terrorist acts as infringements of common penal law with terrorist characteristics, this being due to the motivation of the practicing agents of criminal conduct, or in other words, violations of the fundamental principles of the State with the aim of destroying them.

Therefore, it is also important to highlight the specific environment and circumstances of each country. Six nations will be analyzed regarding their legal mechanisms against terrorism: the UK, the USA, Peru, Argentina, and Chile, with the goal to devise a model for Brazil. In fact, for each nation, the legal system, the history of the statute (background), the law itself, and the impact on civil liberties will be analyzed.

B. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (UK)

The legal system in the UK is the common law.⁷⁷ In this system, the decisions of the judges are fundamentally based on custom and judicial precedent rather than a literal interpretation of statutes.⁷⁸ It is the opposite of the civil law system. In fact, there are some consequences and differences in the application of the law based on the legal system of the country, especially regarding the importance of the jurisprudence and statutes. The civil law tradition focuses on the written law, which can be interpreted by the courts, but always within the strict limits of the statutes. The precedents can never make extreme changes or innovations in the written law. The common law tradition privileges jurisprudence and it is also called “judge-make” law.

Each country has specific reasons for starting to criminalize terrorism. Lindsay Clutterbuck stated,⁷⁹ “in the UK, for example, it began with the passing into law of the Prevention of Terrorism Act in the immediate aftermath of the IRA bomb attacks on two public houses in Birmingham on November 21, 1974, when 21 people were killed and 162 injured.”

⁷⁷ Black’s Law Dictionary, “Common Law.” <http://thelawdictionary.org/common-law/>.

⁷⁸ Ibid.

⁷⁹ Cronin and Ludes, eds., *Attacking Terrorism: Elements of a Grand Strategy*, 145.

The historical context of the British effort to combat terrorism in Northern Ireland explains the evolution of the law in that country. In this step, the judgments and complaints from the civil society had a fundamental influence, leading to improvements in the rules against terrorism. According to Kent Roach,⁸⁰ “The legislative nature of British approaches to terrorism also has meant that the courts have played a prominent role in reviewing both laws and executive actions taken to prevent terrorism.”

Currently, the Law that regulates the combat of terrorism in the UK is called the Terrorism Act.⁸¹ It is the law that superseded other legal diplomas: Prevention of Terrorism (Temporary Provisions) Act 1989⁸² and the Northern Ireland (Emergency Provisions) Act 1996.⁸³ It has received several changes since it was promulgated, especially in the years 2001, 2005, 2006, and 2008.

The legal model is very comprehensive. Its statute has a broad definition of terrorism and requires proof of political, religious, racial, or ideological cause.⁸⁴ In addition, in the statute, one can see procedures, proscription of terrorist groups, fund-raising, money laundering, disclosure of information, interpretation, evidence, investigations, police powers, officers’ powers, and miscellaneous areas.⁸⁵ It was a new paradigm of law, “as permanent legislation that would apply throughout the United Kingdom.”⁸⁶

According to Kent Roach, the British commitment to legalism,⁸⁷

explains why the United Kingdom’s use of administrative, preventive, and investigative detention is heavily regulated by law and does not have the

⁸⁰ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011), 239.

⁸¹ The National Archives, “Terrorism Act.” <http://www.legislation.gov.uk/ukpga/2000/11/section/1>.

⁸² The National Archives, “Prevention of Terrorism (Temporary Provisions) Act 1989.” <http://www.legislation.gov.uk/ukpga/2000/11/section/1>.

⁸³ The National Archives, “Northern Ireland (Emergency Provisions) Act 1996.” <http://www.legislation.gov.uk/ukpga/2000/11/contents>.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Roach, *The 9/11 Effect: Comparative Counter-Terrorism*, 239.

⁸⁷ Roach. *The 9/11 Effect: Comparative Counter-Terrorism*, 238–239.

ad hoc and extra and extralegal character of post-9/11 American experiments such as the initial Guantanamo detentions, immigration roundups, and the abuse of material witness warrants.

The reason behind such a very large, detailed Terrorism Act was the history of abuses that had happened in combating terrorism in Northern Ireland since the 1970s.⁸⁸

Nowadays, after several legislative changes, the law is more appropriate for the combat of contemporary terrorism. The previous law (1989) defined terrorism as the use of violence for political ends with purpose of putting the public in fear. The 2000 Terrorism Act defines terrorism in more detail. In essence, it includes acts of serious violence or threats of violence against persons or property for a political, ideological, or religious purpose with an overriding goal of intimidating the general public. Although the new law still retains a broad concept of terrorism, it is more specific, which helps to prevent violations of civil liberties. This improvement is the result of criticism from civil society and judicial review.

The strongest points of the new law are the clear role of each actor and the definition of terrorism, covering a veritable spectrum (although criticized as too broad) of criminal offenses. By defining the role of the agencies, the law permits them to work in tune, preventing duplicate investigations of the same target, or even colliding investigations. Also, it represents savings in terms of public funds. By defining acts of terrorism more strictly, the law provides a greater guarantee of civil liberties, which may allay the concerns of human rights organizations.

On the other hand, the weakest points of the law are: first, the administrative detention, which is established in fewer cases, but still exists; second, the immigration law, which permits a different treatment for foreigners and may represent a discriminatory approach; third, the use of secret evidence, which could harm the right to defense and due process; fourth, the stop-and-search without reasonable suspicion, which clearly may harm the right to privacy; fifth, the regulation of speech associated with terrorism, which may represent a limitation on the fundamental right to freedom of speech; and sixth, the special courts, which again can be considered as harmful to due

⁸⁸ Roach. *The 9/11 Effect: Comparative Counter-Terrorism*, 238–239.

process and the right to a fair trial. All these points are viewed as highly restrictive of civil liberties.

The most controversial police power promulgated by the 2000 Terrorism Act was stop-and-search. Indeed, the law allows stop-and-search without probable cause or even reasonable suspicion. This constitutes a real invasion of individual privacy, and may be intensely discriminatory, given that the police can choose whoever they want to search without evidence. According to the UK human rights organization Justice, stop-and-search is:⁸⁹

The general term used to describe the power of police (and occasionally other officials) to search members of the public in various contexts. Under section 44 of the Terrorism Act 2000, however, a senior police officer may authorize a certain zone as one in which vehicles and pedestrians may be stopped and searched without reasonable suspicion. The purpose of section 44 is to enable police to carry out so-called 'intuitive' search for items 'of a kind which could be used in connection with terrorism'.

In summary, according to the groups that protect civil liberties in the UK, there have been four excesses in the law against terrorism since 2000:⁹⁰

1. Indefinite detention without charge of foreign nationals if suspected of involvement in terrorism.
2. Unsafe and unfair control orders imposing severe and intrusive prohibitions, including indefinite house arrest for up to 16 hours a day without charge, let alone conviction.
3. Pre-charge detention in terrorism cases, currently allowing for 14-day detention without charge, the longest period of any comparable democracy.
4. Section 44 of the Terrorism Act 2000 allowing stop and search without suspicion, which was disproportionately used against peaceful protesters and ethnic minority groups.

⁸⁹ Justice Organization, "Stop and Search." <http://www.justice.org.uk/pages/stop-and-search-under-the-terrorism-act-2000.html>.

⁹⁰ National Council for Civil Liberties, "Overview of Terrorism Legislation." <https://www.liberty-human-rights.org.uk/human-rights/countering-terrorism/overview-terrorism-legislation>.

Although broad, the statute reflects recent history and is completely justified by the series of grievous terrorist acts in the UK. Despite the criticism, the legal system in the UK has permitted reasonable combat against terrorism in terms of criminal prosecution and preventive measures to avoid attacks and arrest suspects.

C. UNITED STATES OF AMERICA

Due to its UK heritage, the U.S. legal system is the common law. Since the time of the 13 colonies, American citizens had always thought they had the same rights as their English counterparts, and more—they added religious and political liberties and freedom of expression.⁹¹ Consequently, the common law naturally crossed the ocean and established roots in America. The statute related to terrorism (The USA Patriot Act) has to be analyzed in this legal context.

The USA Patriot⁹² Act was passed by Congress in response to the terrorist attacks of September 11, 2001. Despite the complexity of many of the USA Patriot Act rules and their impact on constitutional values, the Act was approved by Congress through an emergency procedure without debate or amendment worthy of mention. Although the document incorporated proposals that had been made prior to September 11, they assumed a clearly secondary role in the Congressional debate, especially since a large majority considered them highly detrimental to civil rights, and even brought into question their compatibility with the Constitution.⁹³

The USA Patriot Act of 2001 was an extensive, complex law that made substantial changes to 15 federal laws and provided extraordinary executive powers to operational control structures and intelligence services.⁹⁴

⁹¹ Leonard W. Levi, *Origins of the Bill of Rights* (New Haven: Yale University Press, 1999), 1.

⁹² Department of Justice, “USA PATRIOT Act, Uniting, and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.”
<http://www.justice.gov/archive/ll/highlights.htm>.

⁹³ Roach, *The 9/11 Effect: Comparative Counter-Terrorism*, 237.

⁹⁴ Department of Justice, “The USA PATRIOT Act: Preserving Life and Liberty.”
<http://www.justice.gov/archive/ll/highlights.htm>.

According to the official version of the U.S. Department of Justice, “the Act Improves Our Counter-Terrorism Efforts in Several Significant Ways.” There are five basic lines of thought:⁹⁵

1. The Patriot Act allowed investigators to use the tools that were already available to investigate organized crime and drug trafficking.
2. The Patriot Act facilitated information sharing and cooperation among government agencies so that they could better “connect the dots.”
3. The Patriot Act updated the law to reflect new technologies and new threats.
4. The Patriot Act increased the penalties for those who commit terrorist crimes.

The Act gave federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption in U.S. financial institutions for foreign money laundering purposes. It sought to further close our borders to foreign terrorists and to detain and remove those within our borders. It created new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it was not without safeguards, critics contended some of its provisions went too far. Although it granted many of the enhancements sought by the Department of Justice, others were concerned that it did not go far enough.

According to Kent Roach:⁹⁶

The Patriot Act may have become a symbol of the United States’ responses to 9/11, but it was a deep misleading one. Americans on both the Right and the Left worried about how the Patriot Act would affect their privacy, while far more nasty things happened through executive action. These activities included the post-9/11 immigration roundup, de facto preventive and investigative detention under material witness warrants, illegal surveillance by the NSA, and executive authorization of harsh interrogation on the basis of the infamous torture memos.

⁹⁵Ibid.

⁹⁶ Roach, *The 9/11 Effect: Comparative Counter-Terrorism*, 237.

Other important points include the expansion of the scope of National Security Letters, which are administrative subpoenas enabling investigators to review records of suspected foreign agents and scrutinize U.S. residents and visitors who are not alleged to be terrorists or spies. These investigations are not subject to judicial review unless a case comes to court.

It is noteworthy that, despite several criticisms in the civil rights field, the public in the U.S., and in the whole world, have only paid more attention to these after the revelations in the files leaked by Edward Snowden. Since the first impact of the news, the leaks have provoked passionate debate, raising solid arguments on both sides. This issue, however, is not new. Since 2006, after the WikiLeaks case, the official position has been the same: surveillance is fundamental to protect a nation against terrorism. The Attorney General, Alberto Gonzalez's defense of the NSA's warrantless surveillance program summarizes the State point of view:⁹⁷

The warrantless surveillance has "been extremely helpful in protecting America" from terrorist attacks. However, because the program is highly classified, he said he could not make public examples of how terrorist attacks were actually disrupted by the eavesdropping.

The same protection argument was used by President Obama in the case of the NSA's metadata collection. On the other hand, most members of civil society were shocked by how deeply the U.S. government could invade individual privacy in the name of national security. In fact, Snowden's revelations showed the apex of the role of the State in invading privacy. For the advocates of civil liberties, Snowden's leaks are the most blatant representation of violation of the right to privacy by a government that can, apparently, justify anything to achieve its goals. In *The New York Times*, we can see a report covering the core concerns about the NSA program. In the words of the Federal Judge Leon:⁹⁸

⁹⁷ Rahul Sagar, *Secrets and Leaks: The Dilemma of State Secrecy* (Princeton, New Jersey: Princeton University Press), 2.

⁹⁸ Charlie Savage, "Judge Questions Legality of N.S.A. Phone Records." *New York Times*, December 17, 2013, <http://www.nytimes.com/2013/12/17/us/politics/federal-judge-rules-against-nsa-phone-data-program.html?pagewanted=all&r=0>.

I cannot imagine a more ‘indiscriminate’ and ‘arbitrary’ invasion than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval. Surely, such a program infringes on ‘that degree of privacy’ that the founders enshrined in the Fourth Amendment.

The leaks in the U.S. have instigated a more profound debate regarding the scope of anti-terrorism law, and how far individual privacy should yield to the public benefit. In the cited episodes, civil society had the opportunity to observe that the methods frequently used by the State are sometimes not morally correct, and may violate personal privacy. Whether or not these actions can be justified by the argument of national security, is a question to which society has not yet totally responded. The debate originated with the leaks has not yet resulted in a consolidated answer, but it may imply future revision of the terrorism law by the courts or parliament.

D. ARGENTINA

The system in Argentina is the civil law, like almost all nations that have undergone colonization and inherited a continental European tradition.

Until the 1990s, Argentina, like Brazil, had no previous record of international terrorism, though both countries had suffered acts resembling terrorism during the revolutionary movement in the last century.⁹⁹ Later, however, Argentina suffered two major terrorist acts: the first, in 1992, when a car bomb was detonated at the Israeli Embassy, killing 29 and hurting over 250; and the second, in 1994, when a suicide terrorist in a car bomb drove into AMIA (Argentina-Israel Mutual Association), causing 85 deaths and injuring more than 300 people. Thus, once again, Israelis had been targeted in two major terrorist acts.¹⁰⁰ The inquiries conducted by the Argentine authorities concluded that officials linked to the Iranian Embassy in Argentina had participated in the attacks.¹⁰¹

⁹⁹ Arns, *Brasil: Nunca Mais*, 29 Gaspari, *As Ilusões Armadas Vol. 1 A Ditadura Envergonhada*, 08.

¹⁰⁰ Horacio Calderon, “Winds of War in The Levant and Middle East – The Hariri and AMIA cases.” http://edoc.bibliothek.uni-halle.de:8080/servlets/MCRFileNodeServlet/HALCoRe_derivate_00005278/CAEI_14_2.pdf.

¹⁰¹ *The Times of Israel*, “Argentinian Prosecutor Alleges Extensive Iranian Terror Activity in South America.” <http://www.timesofisrael.com/prosecutor-in-1994-argentina-bombings-points-finger-at-iran/>.

Since that time, the Argentine authorities have been very concerned about terrorism, firstly, because they had not managed to avoid the attacks, and, secondly, because the investigations had faced a lot of problems.¹⁰² Thus, the law against terrorism was based on much more concrete events, and the lack of preparation prior to the first attacks had led the people to clamor for an antiterrorism statute.

The statute against terrorism in Argentina was promulgated in 2007, and the Penal Code was reformed to criminalize money laundering as an international source of funding for terrorism. Furthermore, in 2011, Law 26,734 (Antiterrorism) amended article 41 of the Penal Code to double the penalty for acts “either in order to terrorize the population or in order to press the national state authorities, or foreign governments, or agents of an international organization to do or not to do something...”¹⁰³

The aforementioned law established a penalty of 5 to 15 years’ imprisonment, as well as 2 to 10 times this sentence for companies involved in transactions to collect or provide money for the financing of terrorist acts.¹⁰⁴

The Antiterrorism Law in Argentina is criticized because the statute is too broad, too open and could be used to qualify protests against the government as terrorist acts. The human rights groups also complain that the law seems like those issued in the dictatorship period.

Summarizing the main ideas of the criticisms of Argentina’s Anti-Terrorism Law:¹⁰⁵

There is also a violation of the principle of proportionality because the sanctions are not proportional to the object of legal protection: since any offence could be criminalized with the double of the original punishment established in the law, the gravity of the terrorist act does not seem to be

¹⁰² *BBC News*, “Flashback: Argentina Bomb.” <http://news.bbc.co.uk/2/hi/americas/3179861.stm>.

¹⁰³ Documentation and Information Centre, Ministry of Economy and Public Finance, “InfoLeg/Codigo Penal.” <http://www.infoleg.gov.ar/infolegInternet/anexos/190000-194999/192137/norma.htm>.

¹⁰⁴ *Ibid.*

¹⁰⁵ Academia, “Terrorism and Anti-terrorism in South America with a Special Consideration of Argentina, Chile and Colombia.” https://www.academia.edu/6524563/Terrorism_and_anti-terrorism_in_South_America_with_a_special_consideration_of_Argentina_Chile_and_Colombia.

clear. Social protests, for example, and therefore non grave offences committed in its occasion could be easily prosecuted as an offence with terrorist goals.

As mentioned, the statute in Argentina is the consequence of serious terrorist attacks. It has been developing and adapting to new situations involving terrorism (e.g., money laundering). Although the statute seems reasonable, the broad aspects of the law could impair its democratic role as an instrument to guarantee stability. Lots of real life situations could be interpreted as terrorism, when really they are not. There have been recent attempts by the Argentine government to prosecute some legitimate acts of protest by the opposition, or even any act that is simply in disaccord with the current president's view. As an example, the government tried to classify as an act of terrorism the declaration of bankruptcy by RR Donnelley & Sons, a subsidiary of an American company in Argentina, claiming that the closure of the enterprise would aggravate the economic crisis.¹⁰⁶ Thus, it is important to have a clear description of the situations that constitute terrorist acts.

E. CHILE

The legal system in Chile is the civil law, like in Argentina, Peru and the rest of Latin America.

In Chile, in 1984, the Anti-Terrorism Law was promulgated during the dictatorship of General Augusto Pinochet. At that time, the government was opposed by protesters, some of whom had decided to resort to armed combat against the regime.¹⁰⁷ Furthermore, especially after democratization (1991), the law was changed to adapt to the new scenario.¹⁰⁸

¹⁰⁶ Phil Rosenthal, "R.R. Donnelley as Argentine Terrorist a Hard Zell." *Chicago Tribune*, August 23, 2014, <http://www.chicagotribune.com/business/columnists/ct-phil-rosenthal-argentine-0824-biz--20140822-column.html>.

¹⁰⁷ da Cunha, *Terrorismo Internacional e Política Externa Brasileira Após o 11 de Setembro*, 49.

¹⁰⁸ Ibid.

Section 1, Article 2 of Law 18314,¹⁰⁹ promulgated in 1984, and listed terrorist crimes as follows: murder, injury, kidnapping (confinement, detention, and retention of a person as a hostage or abduction), sending explosive effects, fire, and destruction, offenses against public health and derailment. In the same article, the statute establishes:¹¹⁰

As long as they occur in the following circumstances: committed with the intention of producing in the population, or part of it, a justified fear of becoming victims of crime, whether by the nature and effects of the means employed, or by evidence of a premeditated plan to attack a category or group of people, or inhibit an authority or force it to obey a demand. An order to produce such fear in the general public is presumed. The means include explosive or incendiary devices, weapons of great destructive or infectious substances or other means that could produce havoc, or letters, parcels or similar objects containing an explosive or toxic device.

Nowadays, the law is under debate as to whether it should be modified. According to Paulo Molina:¹¹¹

Chile's anti-terrorism law is at the center of a debate. This time, the legal legacy of the military government of Augusto Pinochet is being severely criticized by national groups, international agencies, and so the administration of President Michelle Bachelet is studying reforms.

One of the most consistent critics of the Chilean government comes from the Human Rights Watch concerning its use of anti-terrorism legislation against the indigenous population, the Mapuche. The group claims: "The use of an antiterrorism law to try Mapuche accused of acts of violence violates the basic due process rights of these

¹⁰⁹ Library of Congress Chile, "Determina Conductas Terroristas e Fijas su Penalidades" [Determined Terroristas Conducts and Fix Its Penalties], trans. Carlos H. Oliveira de Sousa, <http://www.leychile.cl/Navegar?idNorma=29731&buscar=18314>.

¹¹⁰ Ibid.

¹¹¹ *BBC News*, "Los Problemas de Chile y su Ley Antiterrorista" [Chile Issues and Anti-Terrorism Law], trans. Carlos H. Oliveira de Sousa, http://www.bbc.co.uk/mundo/noticias/2014/08/140801_chile_ley_antiterrorista_nc.shtml.

indigenous defendants.”¹¹² In the same way, Ben Emmerson, a United Nations independent expert on human rights and counter-terrorism, states:¹¹³

The anti-terrorism law has been used in a manner that discriminates against the Mapuche. It has been applied in in a confused and arbitrary fashion that has resulted in real injustice, has undermined the right to a fair trial, and has been perceived as stigmatizing and de-legitimizing the Mapuche land claim and protests.

Recently, a decision established, by the Inter-American Court of Human Rights, Organization of American States (OAS), the government of Chile used the Antiterrorism law unduly against the Mapuche.¹¹⁴

The Inter-American Court of Human Rights, the highest judicial body of the Organization of American States (OAS), reached a decision in favor of eight Mapuche individuals who claimed that Chile’s use of the Anti-Terrorism Law against them violated their rights. The decision was written on May 29, 2014 and was later made public during the week of July 28, 2014. The Court found that Chile’s Anti-Terrorism Law denied the eight Mapuche individuals a number of due process rights and ordered Chile to vacate their judgments against the individuals and to compensate them for the violations. The case was a historic victory for the Mapuche and their supporters who have been protesting the use of the Anti-Terrorism law against their people for many years.

In fact, the Chilean law is currently under critical debate, which reflects its historical roots. Apparently, it no longer fulfills the requirements of contemporary society. At present, a bill to reform the terrorism law is before the Chilean Congress. The debate has been catalyzed by a wave of terrorist attacks, especially the last one, in September 2014, in a metro station, where thirteen people were injured. According to the Minister of the Interior, Rodrigo Peñailillo, the “the new law will regulate cover agents, wiretaps, and several legal measures that are already applied against organized crime and drug trafficking in the country, but not to combat terrorism, because they have not been

¹¹² Human Rights Watch, “Chile: Terror Law Violates Due Process Mapuche.” <http://www.hrw.org/news/2004/10/27/chile-terror-law-violates-due-process-mapuche>.

¹¹³ United Nations, “Chile Must Stop Using Anti-Terrorism Law against Mapuche Indigenous Group Expert.” <http://www.un.org/apps/news/story.asp?NewsID=45538#.VA4u2vRDthw>.

¹¹⁴ *Indigenous News*, “Inter-American Court of Human Rights Finds in Favor of Mapuche Individuals.” August 8, 2014, <http://indigenousnews.org/2014/08/08/inter-american-court-of-human-rights-finds-in-favor-of-mapuche>.

included in the current terrorism statute.”¹¹⁵ Hence, the new bill is an attempt to update the law against terrorism in a country that has developed a lot, economically and socially, since the end of the military regime.

F. COLOMBIA

The legal system in Colombia is the civil law. According to the Council on Foreign Relations,¹¹⁶ Colombia has a history of conflicts:

Colombia has a long history of violence and unrest, including La Violencia, the 1948–58 civil war that claimed more than 200,000 lives. In the early 1960s, leftist militant groups—such as the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN)—began to wage guerrilla war against the government throughout the countryside. After Colombia became the hub of the global cocaine trade in the 1980s, the violent Cali and Medellín drug cartels gained power and caused more havoc. The late 1980s and early 1990s saw the emergence of rightist paramilitary forces. Known as the United Self-Defense Forces of Colombia, or AUC, they were backed principally by drug kingpins and rural business leaders. Today, the FARC, the ELN and the AUC — motivated by a mix of ideology, hunger for drug money, and desire for power—engage in terrorism and the narcotics trade, despite the U.S. aid package known as Plan Colombia.

Despite the efforts and substantial changes that have occurred in Colombia in recent years, the law, originally promulgated as a clear response to the reality of heavy conflicts at that difficult time, still reflects that period.

In Colombia, there are specific laws prohibiting the financing of terrorism (Laws 526 and 1121).¹¹⁷ The main law about terrorism, however, is the Penal Code. The crimes related to terrorism are in the Penal Code (Law 599) in different parts, and the most

¹¹⁵ Opera Mundi, “Nova Lei Antiterrorista Chilena Permitira Acao de Agents Encobertos e e Elogiada pela Oposicao” [New Chilean Anti-Terrorism Law Allows Action of Undercover and is Praised by the Opposition], trans. Carlos H. Oliveira de Sousa, November 7, 2014, <http://operamundi.uol.com.br/conteudo/noticias/38450/nova+lei+antiterrorista+chilena+permitira+acao+de+agentes+encobertos+e+e+elogiada+por+oposicao.shtml>.

¹¹⁶ Council on Foreign Relations Colombia, “Terrorism Havens: Colombia.” <http://www.cfr.org/colombia/terrorism-havens-colombia/p9358>.

¹¹⁷ Revista Eletrônica da Faculdade de Direito Programa de Pós-Graduação em Ciências Criminais. “Terrorism and Anti-terrorism in South America with a Special Consideration of Argentina, Chile and Colombia.” trans. Carlos H. Oliveira de Sousa, *Porto Alegre* 4, no. 1 (Janeiro/Junho 2012): 46–74.

important points are in Articles 144, 173, 178, 343, 354.¹¹⁸ In fact, the description of the crime of terrorism is in Article 343, as follows: “That which provokes a state of anxiety or terror in the population or any segment thereof, in acts which endanger the life, physical integrity or liberty of persons or buildings or means of communication, transportation, processing or fluid handling or driving forces, using means capable of causing havoc.” In addition, in the same Penal Code, there are articles that treat the financing and management of financial resources related to terrorist acts, hijacking of aircraft, ships or any means of public transportation.¹¹⁹

Another interesting aspect of the Penal Code that is important in the Colombian reality is Article 144, which states: “Any person who, during the course of an armed conflict, undertakes or orders indiscriminate or excessive acts, or targets the civilian population for attacks, reprisals, violence or threats for the main purpose of terrorizing them.”¹²⁰ Indeed, it covers preliminary acts of terrorism, in the chapter about “Terrorism, Threats and Instigation.”¹²¹ This is a very important point, bearing in mind the reality of Brazil, where this is the kind of crime that has occurred, as police records of investigations show.¹²²

Although the law in Colombia reflects the reality of years of internal conflict, it is very interesting because it reveals several kinds of problems: domestic terrorism, international terrorism, narcoterrorism, fights between drug dealers, threat to the state, and threat to the authorities. It is a very broad law and covers a lot of crimes related to terrorism.

¹¹⁸ Senate Colombia “Ley 599 DE 2000” [Law 599 2000], trans. Carlos H. Oliveira de Sousa, http://www.secretariasenado.gov.co/senado/basedoc/ley_0599_2000.html.

¹¹⁹ Ibid.

¹²⁰ Senate Colombia “Ley 599 DE 2000.” http://www.secretariasenado.gov.co/senado/basedoc/ley_0599_2000.html.

¹²¹ María Laura Böhm et al., “Terrorism and Anti-terrorism in South America with a Special Consideration of Argentina, Chile and Colombia.” trans. Carlos H. Oliveira de Sousa, *Revista Eletrônica da Faculdade de Direito Programa de Pós-Graduação em Ciências Criminais*, 1, no. 4 (Janeiro/Junho 2004): 46–74.

¹²² *Veja Magazine*, “Exclusivo: Documentos da CIA, FBI e PF Mostram como Age a Rede de Terror Islamico no Brasil.” 2011, <http://veja.abril.com.br/noticia/mundo/exclusivo-documentos-da-cia-fbi-e-pf-mostram-como-age-a-rede-do-terror-islamico-no-brasil>.

In the field of civil rights, there are several main problems:¹²³ extrajudicial, summary, or arbitrary execution by the FARC-EP and ELN; violations of the right to life and personal integrity committed by security forces; arbitrary detention of human rights defenders; and a large number of persons registered as disappeared or missing.

According to some scholars, Colombia is still trying to improve its system:¹²⁴

In sum, in the Colombian case, one can see a parallel and constant development between terrorism and counter-terrorism measures. Colombian law has tried to adjust to the several transformations of its internal armed conflicts and the respective changes in the behavior of terrorists. However, throughout the political and military fight against terrorism there have sometimes been decisions made which are considered detrimental to human rights. Fortunately, some institutions of the State, as in the case of the Constitutional Court in relation to the Anti-terrorist Statute, have achieved that the anti-terrorism measures respect human rights and constitutional principles. In this regard, the main commitment of the Colombian State in the global fight against terrorism is to continue preventing terrorist acts and suppressing terrorist organizations while respecting the human rights of both terrorists and non-terrorists. Thus, the State guarantees that it is not repeating the atrocities perpetrated by the terrorists who it is trying to punish.

The law in Colombia is a byproduct of the history of violent conflict in the country. Similar to Colombia, Peru also has a history of severe terrorism conflict, and a statute regulating acts of terrorism. The law in this nation, however, has a different approach.

G. PERU

The legal system in Peru is the common law. The law against terrorism was promulgated in 1992, under the presidency of Alberto Fujimori. At that time, the country was in a bad economic phase, suffering the consequences of recent problems of nationalization, and the suspension of all foreign payments during the mandate of President Alan Garcia (1985–1990). When Fujimori started his mandate as President, in

¹²³ Human Rights First Organization website, accessed September 10, 2014, “Baseless Prosecution of Human Rights Defenders in Colombia.” <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090211-HRD-colombia-eng.pdf>.

¹²⁴ Böhm et al., “Terrorism and Anti-terrorism in South America with a Special Consideration of Argentina, Chile and Colombia.” 46–74.

1990, the economy was in decline and inflation was out of control, with prices regulated by the government. Despite the changes in economic policy, including inflationary control, under Fujimori, the economic situation in 1992 was still bad.¹²⁵ Thus, the next step for Fujimori was to make a radical change in the regime.

According to Jared Roy Endicott:¹²⁶

In 1992, Fujimori went on national television to announce that he was temporarily dissolving Congress and had passed eleven new laws by decree in order to combat the growing terrorist threat. In the two years since his election, the problem had only grown, with deadly attacks becoming a common occurrence in the heavily populated Lima. Fujimori's Autogolpe, the Self-Coup, was backed by the military and his approach to fighting and prosecuting terrorism took a totalitarian turn.

In other words, the new phase in the combat of terrorism in Peru started with the promulgation of the law against it because the Congress was taking too long to pass the same antiterrorism legislation.

Decree Law 25475, promulgated by the Fujimori regime in 1992, is the law that regulates terrorism in Peru. It states the basic form of terrorism, aggravated terrorism, acts of collaboration, conspiracy, incitement, and advocacy of terrorism. The law also describes terrorism as a form of violent political act directed against a government, a state, a group, social organization, or entire population.

The criticisms of the law are that the definitions of the types of crimes are too open, too broad, which affects the principle of legality.¹²⁷ In general, there are reports of abuse on the part of state agents during the most intense phase of repression of terrorism.

According to Human Rights Watch—World Report 2014:¹²⁸

¹²⁵ David S. Palmer, *Introduction: History, Politics, and Shining Path in Peru* (New York: San Martin's Press, 1994), 13.

¹²⁶ Realizing Resonance Futurist Philosophy Blog, July 22, 2013, <http://jared.realizingresonance.com/2012/07/22/the-evolution-of-terror-in-peru-conquest-communism-and-cocaine>.

¹²⁷ Carlos Rivera Paz, "Ley Penal, Terrorismo y Estado de Derecho" [Criminal Law, Terrorism, and Rule of Law], trans. Carlos H. Oliveira de Sousa, *Quehacer* 167 (July/August 2007).

¹²⁸ Human Rights Watch Organization, "Peru." <http://www.hrw.org/world-report/2014/country-chapters/peru?page=1>.

Peru's Truth and Reconciliation Commission estimated that almost 70,000 people died or were subject to enforced disappearance during the country's armed conflict between 1980 and 2000. Many were victims of atrocities by the Shining Path and other insurgent groups; others were victims of human rights violations by state agents.

There is consensus in Peruvian society that a lot of crimes and abuses happened during the combat of terrorism, and these were committed by both parties: state agents and terrorists. A clear sign of this is the fact that President Fujimori, the former President, and his main advisor, Vladimiro Montesinos, were sentenced to imprisonment.¹²⁹ In summary, the Peruvian anti-terrorism law with its idiosyncrasy is not a model to follow.

H. FINAL CONSIDERATIONS

The critique of the establishment of the counter-terrorism law can be summarized in the three following points, common to all six countries cited: possibility of exaggerated extension of state powers in the case of a critical or emergency situation, criminalization of social movements, and infringement of civil rights. In general, the criticisms are made by groups that protect human rights, and political opponents to the governments in power. It is important to realize, however, that a certain degree of exaggeration has taken place, mainly in the modifications that occurred immediately after the September 11 attacks.

Although there are differences among the countries' respective laws and policies, in most aspects they are quite similar. The first reaction to attacks is generally the issue of new laws as a direct, robust response, permitting the country to react and prepare itself to prevent new threats. This is common among the selected countries. After the first reaction, normally the legislation is passed through the filter of the Judiciary, and it becomes more aligned with the whole legal system.

Regarding civil liberties, the same improvement seems to occur. The first step after sustaining an attack reflects the need for a strong reaction, and this impacts the field of civil rights. After a period-of-time, under pressure from civil society and intervention by the Judiciary, the excesses are reduced. There will always be circumstances in which

¹²⁹ Ibid.

the fight against terrorism will represent a high cost to society, however, including in the field of civil rights.

Finally, it is important to state that only the United States has chosen the law of war against al-Qa'eda and associated forces. According to Jeffrey F. Addicott,¹³⁰ “other nations have chosen to modify their existing criminal law framework to allow, for example, increased detention periods pending the investigation of a terrorist-related offense.”

In the case of Brazil, the reality shows the necessity of a law much more on the lines recommended by the scholar: “The trend in many countries is for terrorism-specific laws that target remote acts of preparation and planning that would not be caught by general offences of attempts, conspiracy, or incitement.”¹³¹ Therefore, the model for Brazil must receive influence from the aforementioned laws, but adapted to its necessity, specificity, and idiosyncrasies. This is the challenge for the next chapter.

¹³⁰ Jeffrey F. *Terrorism Law Materials, Cases, Comments* 7th Edition (Tucson: Lawyers and Judges Publishing Company, 2014), 47.

¹³¹ Ramraj et al., eds., *Global Anti-Terrorism Law and Policy*, 114.

V. CONCLUSION

In this conclusion, we will present the key elements of a model criminal law with respect to terrorism bearing the core characteristics that fit Brazilian realities. Based on the knowledge and experience we have been showing in this work, there are several characteristics that need highlighting. The criminal law should be a specific statute, separate from the already existing Brazilian Penal Code, bearing a strict definition of acts of terrorism and preliminary acts of such, and a clear definition of policy, co-ordination, and the role of each agency involved in the investigation and prevention of terror.

First of all, four countries have a separate law that exclusively regulates terrorism (United States, UK, Chile, and Peru). Only Argentina and Colombia have incorporated the rules about terrorism into the Penal Code or in general criminal law. The difference is that, in the case of Argentina and Colombia, the rules about terrorism were inserted in the Penal Codes that also regulate other crimes. The six countries define terrorism in different ways. Some of them, such as Argentina and Peru, have a broad definition of terrorism. In addition, the UK law requires proof of political, religious, racial, or ideological cause. In the Brazilian model, there is no way to create a broad definition of terrorism. This is the main concern for organized civil society, and the reason that Brazil does not already have such a law. Regarding the USA Patriot Act, Brazil needs to adopt the same idea as in this model, which does not require proof of religious or political motives. For Brazil, the scenario is much more one of potential terrorist attacks that target other countries. It is similar to what happened in Argentina in 1992 and 1994 when that country suffered two attacks. Scholars agree that Argentina's agencies not only failed to prevent the attacks, but also to investigate them.¹³² This is the most important case study for Brazil, especially because it happened in South America, in a country normally without problems of terrorism.

Regarding the role of each agency that deals with terrorism, the laws of each country show this point very clearly. Thus, the countries designate who is to be in charge

¹³² *The Times of Israel*, "Argentinean Prosecutor Alleges Extensive Iranian Terror Activity in South America." <http://www.timesofisrael.com/prosecutor-in-1994-argentina-bombings-points-finger-at-iran/>.

during a terrorist incident; typically, their national or local police. These detailed roles of each agency and their procedures are important points that fit the Brazilian model. Another important point in common among the six countries is clear policies and strategies that aim to prevent terrorism. Normally, they have a central agency coordinating all the efforts regarding the theme. In this field, the role of the agencies that deal with domestic intelligence is normally coordinated by a central agency. The critical points, like stop-and-search, are not necessary in a place without major risks of terrorist attacks. The potential restriction of civil rights is another focus of resistance to approval of the law.

Furthermore, Chile, Colombia, and Peru have laws that do not fit the Brazilian reality. Indeed, they have all come under serious criticism from civil rights organizations. The only exception is one important aspect of Colombian law, that which covers preliminary acts of terrorism. These consist of preparing instruments and creating conditions to commit such crime. This is a real threat in Brazil, and the major focus of the investigations that have been conducted.¹³³ It is an important point to be included in the Brazilian model.

In conclusion, repeating the main points of this work, the Brazilian population and their representatives do not have major concerns about terrorist attacks in the country. It is not a priority. On the other hand, the treaties and agreements that Brazil has signed obligate it to have a law against terrorism. The international pressure on the country to have such a law, however, has not worked until now. In fact, after the announcement of Brazil as the host of two mega events—the 2014 FIFA World Cup and the 2016 Summer Olympic Games—all actors involved in this matter had thought that these were opportunities to fill the gap. Moreover, the importance of the country as a global player, and its increased role in the global scenario, indicate a need for clear rules, and counter-terrorism law is one of them. The reality is that, so far, the appeal of these events has not been sufficient to create the law. In addition, the specialists that deal with terrorism in

¹³³ *Veja* Magazine, “Exclusivo: Documentos da CIA, FBI e PF Mostram como Age a Rede de Terror Islamico no Brasil.” 2011, <http://veja.abril.com.br/noticia/mundo/exclusivo-documentos-da-cia-fbi-e-pf-mostram-como-age-a-rede-do-terror-islamico-no-brasil>.

Brazil consider that the country needs a law against terrorism to clearly define the role of each agency and its responsibilities to investigate and prevent possible attacks. Indeed, this study shows that the law in countries like Brazil—without terrorist attacks—needs to focus much more on the possibility of preparing, financing, or supporting terrorist activities. Regarding the Bill of Rights in relation to the theme, the main reason our Congress has not passed such a law is the pressure from organized civil society, which claims that it could be detrimental to civil rights, especially the right to protest against the government.

Which criminal legal model best fits Brazil? What are the main points that this law needs? First, it should consider the possibility of a terrorist attack. Second, it should present the rules for governing each organization in the fields of terrorism prevention and repression. Next, it should criminalize acts of preparation, planning, and support of terrorism. Finally, such legislation needs to avoid criminalizing acts of protest against the government. In summary, the law in Brazil needs a strict definition of terrorism that does not affect the right to demonstrate against the government. In addition, it requires a clear definition of the role of each agency, how evidence is to be gathered, and what the procedure should be in the case of an attack.

Finally, repeating the main issue of this paper: does Brazil need a criminal terrorism law? We have shown that Brazil needs to fulfill the international treaties and agreements that actually obligate it to have a criminal law against terrorism. In addition, to improve its position as a global player, it needs to have a trustworthy system. Thus, having a law against terrorism is an important requisite. The main concern regarding the law is the possibility of adversely affecting civil rights. In the model, we can avoid this temptation and eliminate it from the law. This is the main conclusion of this work. Finally, we would like to conclude by citing a scholar: “to paraphrase Winston Churchill about democracy, the criminal law appears to be the worst way to respond to terrorism—except for all the others that have been tried.”¹³⁴

¹³⁴ Ramraj et al., eds., *Global Anti-Terrorism Law and Policy*, 121.

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